



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-05-88-T

Date: 17 December 2008

Original: English

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D25937-D25934
17 DECEMBER 2008

25937
PK

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 17 December 2008

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON DEFENCE REQUEST FOR GUIDELINES CONCERNING
THE USE OF STATEMENTS NOT IN EVIDENCE AND THE
ADMISSIBILITY OF EVIDENCE DURING CROSS-EXAMINATION**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”);

BEING SEISED OF the “Borovčanin Defence Standing Objection and Request for Guidelines Concerning Use of Statements not in Evidence”, filed on 20 October 2008 (“Borovčanin Motion”), the “Borovčanin Defence Objection to the Admission of Excerpts of P210 and Qualified Objection to P3838”, filed on 27 October 2008 (“Borovčanin Motion of 27 October”), the “Motion on Behalf of Drago Nikolić Joining the Borovčanin Defence Standing Objection and Request for Guidelines Concerning Use of Statements not in Evidence”, filed on 27 October 2008 (“Nikolić Motion”), and the “Joint Defence Motion Joining in Part the Borovčanin Motion of 27 October 2008 and Seeking Confirmation of the Purpose for Which Documents Adduced by the Prosecution During Cross-Examination Were Admitted”, filed on 4 November 2008 (“Joint Motion”);

NOTING the “Submission on Behalf of Milan Gvero on the Use of Statements not in Evidence”, filed on 3 November 2008 (“Gvero Submission”), the “Prosecution Consolidated Response to Borovčanin, Nikolić and Gvero Filings Concerning the Use of Statements not in Evidence”, filed on 10 November 2008 (“Prosecution Consolidated Response”), the “Defence Motion Seeking Leave to Reply and Reply to the Prosecution Consolidated Response to Borovčanin, Nikolić and Gvero Filings Concerning the Use of Statements not in Evidence”, filed on 12 November 2008 (“Nikolić Reply”), the “Borovčanin Reply to Prosecution Consolidated Response to Borovčanin, Nikolić and Gvero Filings Concerning the Use of Statements not in Evidence”, filed on 17 November 2008 (“Borovčanin Reply”), the “Prosecution Consolidated Response to Borovčanin Defence and Joint Defence Motions Concerning the Admissibility of Documentary Evidence Tendered by the Prosecution During Cross-Examination”, filed on 18 November 2008 (“Prosecution Consolidated Response to Borovčanin Motion of 27 October 2008 and to Joint Motion”), “Submission on Behalf of Milan Gvero in Relation to the Borovčanin filing of 27 October and the Joint Popović, Beara, Nikolić and Miletić Filing of 4 November 2008”, filed on 18 November 2008 (“Gvero Second Submission”), the “Prosecution Request for Leave to Sur-Reply and Sur-Reply to “Defence Motion Seeking Leave to Reply and Reply to the Prosecution Consolidated Response to Borovčanin, Nikolić, and Gvero Filings Concerning the Use of Statements not in Evidence””, filed on 24 November 2008 (“Prosecution Sur-Reply”), the “Joint Defence Motion Seeking Leave to Reply and Reply to the Prosecution Consolidated Response to Borovčanin Defence and Joint Defence Motions Concerning the Admissibility of Documentary Evidence Tendered by the Prosecution during Cross-Examination”, filed on 25 November 2008 (“Joint Reply”), the “Borovčanin Reply to Prosecution Response Concerning Borovčanin Defence Objection to Admission of the Excerpts of P210 and Qualified Objection to P3838”, filed on 25 November 2008 (“Borovčanin’s Reply concerning the

Admission of the Excerpts of P210 and Qualified Objection to P3838 ”), and the “Motion on Behalf of Drago Nikolić Seeking Leave to Reply and Reply to the Prosecution Sur-Reply to Defence Reply to the Prosecution Consolidated Response to Borovčanin, Nikolić and Gvero Filings Concerning the Use of Statements not in Evidence”, filed on 4 December 2008 (“Nikolić Second Reply”);

NOTING that the Borovčanin Motion of 27 October was dealt with by the Trial Chamber orally on 17 December 2008:

CONSIDERING the arguments set forth in the numerous pleadings and that they raise two distinct issues, one related to the use of statements not in evidence and one related to the introduction of new evidence in support of its case, oral or documentary, by the Prosecution during the course of the Defence case;

CONSIDERING that with regard to statements, while as a general rule it would be sufficient for a party to put its case to the witness pursuant to Rule 90(H) in summary form, in some circumstances more detail may be necessary, and that this is a matter to be determined on a case by case basis;

CONSIDERING that a statement not in evidence that is put to a witness on cross-examination does not become evidence before the Trial Chamber, but is simply in the record as a statement put to the witness for the purpose of adducing the witness’s response to it, and that only the comments of the witness upon the statement form part of the evidence in this case;

CONSIDERING that there is nothing in the Rules which would prevent the Prosecution from adducing evidence—be it oral testimony or documents—in support of its case during the course of the Defence cases, in particular through cross-examination;

CONSIDERING that the terms of Rule 90(H) apply equally to the Prosecution and the Defence;

CONSIDERING that Rule 89 applies to evidence adduced by one party in support of its case during the course of the opposing party’s case, in that the evidence must be relevant and have probative value and its probative value must not be substantially outweighed by the need to ensure a fair trial;

CONSIDERING that the Trial Chamber is of the view that no general conclusions or guidelines are appropriate as to the use or admissibility of any evidence adduced on cross-examination and that the Trial Chamber will continue to decide evidentiary questions on a case by case basis;

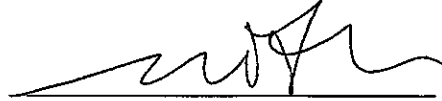
CONSIDERING that when the Trial Chamber has limited the use to be made of any evidence admitted at trial it has done so explicitly, and that evidence admitted at trial without limitation may

be considered by the Trial Chamber for any purpose, and that whether to limit the use made of documents or statements is a matter to be determined on a case by case basis;

PURSUANT TO Rules 54, 89 and 90(H) of the Rules,

HEREBY DISPOSES of the Borovčanin Motion, the Nikolić Motion, the Joint Motion and the Gvero Submission, and **ORDERS** that the parties are granted leave to file the requested replies.

Done in English and French, the English text being authoritative.



Carmel Agius
Presiding

Dated this seventeenth day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]